In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 340

ANTHONY R. FERNICOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13–14) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1966 (Pet. 13). The petition for a writ of certiorari was filed on July 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

227-738—66

2. Whether the prosecutor commented on petitioner's failure to testify.

3. Whether petitioner was denied a fair trial by the prosecutor's statement in summation that he did not believe in the existence of an $81,000 cash hoard claimed to have been received by petitioner from his father's estate.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. 7201):

ATTEMPT TO EVADE OR DEFEAT TAX

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On April 4, 1962, petitioner was indicted in the United States District Court for the District of New Jersey on three counts of willfully attempting to evade individual income taxes for the years 1955 through 1957, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment alleged total unreported income of $75,017.95 for the three years. (R. 1a–2 through 1a–5.) After a trial by jury, petitioner was found guilty on all counts and fined $10,000 on each (R. 514a).

1. Since no records of petitioner's medical practice were ever made available to either the government or the accountant who prepared the tax returns—all the

information on the returns being furnished by petitioner himself—the government was obliged to rely upon the net-worth method of establishing petitioner's income. (R. 6b, 10b, 34b–35b.) As foundation, the government showed that petitioner had filed no income tax returns prior to 1950 (R. 74a; Pet. 8); he had begun his medical practice in August 1950 (R. 74a); prior thereto he had been an intern and, earlier, had attended various colleges and universities, and had a history of low earnings (R. 74a); for the year and a half prior to the opening of his office, he had earned $30 a month (R. 58b–59b); his net worth at the end of 1950 was $12,459.19 (R. 75a); his net worth at the end of 1954 (the beginning of the prosecution years) was $33,124.30 (R. 83a, 510a) and had increased by $20,655.11 during this five-year pre-indictment period, during which he had reported a total of income after taxes of $27,808 (R. 269b–273b). The government then showed, on the basis of increases in petitioner's net worth, and non-deductible expenditures, that during the prosecution years (1955–1957) petitioner had had unreported income totalling $68,230.02 (R. 510a).

2. The principal issue at trial revolved around petitioner's claim that the increase in net worth upon which the government's case was predicated could be explained by an $81,000 "cash hoard" that he claimed to have received from his father. The background to the issue is as follows. Beginning in 1959 petitioner or his representatives had at least six meetings with representatives of the Internal Revenue Service. Five

of these meetings occurred prior to the return of the indictment in April 1962 (R. 564, 76b). In August 1960 his representatives stated that he had received money from his father or his wife, but no amount was stated, and no particular occasion was described (R. 77b). In January 1961 his representatives stated that he had received $23,000 from his father's total estate of $29,000 and a $50,000 cash gift from his wife which she allegedly had accumulated as a result of black-market operations carried on by her in Africa while employed as an airline stewardess (R. 262a, 288a, 78b). Investigation revealed—and the defense ultimately conceded—that the father's estate had been divided equally among the four sons, and that petitioner's share was not $23,000 but $6,500.17 (R. 85b–86b, 278b–284b).[1] In March 1962, petitioner's representatives advised the government that he had accumulated funds prior to the prosecution years from three sources: his practice of medicine, the $50,000 cash gift from the wife, and cash gifts alleged to have made to him by his father prior to his death (R. 299a–302a).

It was not until November 1964—more than two years after the indictment had been brought—that the defense first advanced the contention that petitioner had received $81,000 in a cash hoard subsequent to his father's death (R. 83b–84b). The defense relied upon the uncorroborated deposition of George Saracino, also known as George Morello, peti-

[1] The government was unable to disprove the $50,000 alleged cash gift from petitioner's wife and therefore gave petitioner credit for that amount (R. 290a, 78b).

tioner's uncle, who testified that he had lived with petitioner's father and upon the latter's death in 1953 had given petitioner a large metal box that had been kept in the apartment by the father and contained at least $75,000 in bills of $10, $20, $50 and $100 denominations (R. 369a, 374a–375a, 379a–380a, 390a–391a, 168b, 169b, 188b). The government relied upon the probate records of the father's estate, which showed a gross estate of $28,653.67 (R. 280b); the records of the bonding company, indicating that petitioner had received $6,500.17 from that estate (R. 85b–86b); petitioner's signature on an approval of an accounting, which showed a gross estate in the amount of $28,653.67 (R. 278b, 281b); the State inheritance tax returns, which showed a total estate of $32,252.65 (R. 283b); and the fact that it was not until the case was calendared for trial that the claim regarding this large cash hoard was first advanced (R. 84b). It was shown, further, that no federal estate tax return had been filed on behalf of the father; nor had any gift tax return ever been filed listing petitioner's father as donor or petitioner as donee (R. 2b). And, although the petitioner's sister-in-law, his cousin and a cleaning woman were frequent visitors to the apartment in which the metal box was allegedly kept, none of them had ever seen such a box (R. 170b, 183b, 187b).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 5, 7–9) that the evidence was insufficient to support the verdict. The burden of establishing a reasonably

accurate opening net worth (*Holland* v. *United States*, 348 U.S. 121, 132) was amply met (Statement, *supra*, p. 3); the argument that petitioner was not given credit for the earnings from his medical practice prior to the indictment period has no basis (see R. 63b–71b, 95b–96b). During the pre-indictment period in question petitioner's total net earnings were only $27,808.00; even if he spent as little as $2,000 a year on living expenses his net worth surely could not have increased in this period by more than the government's figure of $20,665.11 (see Statement, *supra*, pp. 3–5). As for the contention that the government should have credited petitioner with the alleged $81,000 "cash hoard", the record clearly shows the insubstantiality of that claim. Its belated assertion as well as its inherent incredibility in light of the total circumstances justified the government—and the jury—in disbelieving in its existence (Statement, *supra*, pp. 3–5).

2. The argument (Pet. 6, 9–10) that the prosecutor commented on the failure of petitioner to testify is also unsupported. In his summation to the jury petitioner's counsel referred to a $10,000 contribution allegedly made by petitioner to a church in 1954, and argued that this tended to show petitioner had had a large amount of cash on hand (R. 204b–208b). In his 1954 income tax return, however, petitioner—although he itemized many charitable contributions in far smaller amounts—did not claim the alleged $10,000 contribution or any part thereof (R. 274b). It was this and this alone that the prosecutor was re-

ferring to when he told the jury "Dr. Fernicola doesn't say so." (R. 439a–443a.) When an objection was made, (outside of the jury's presence) the judge correctly pointed out that the remark had reference merely to what petitioner had or had not said in his tax return (R. 443a–444a). This was what the jury thought and what the prosecutor intended. There was thus no comment on petitioner's failure to testify. Cf. *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *United States* v. *Fay*, 349 F. 2d 957, 961 (C.A. 2), certiorari denied, 377 U.S. 936. Indeed, the court specifically charged the jury, in the language requested by petitioner, that no inference of any kind could be drawn from his failure to testify (R. 190b, 263b).

The prosecutor's comment on the failure of petitioner's wife to testify (R. 451a–454a) was not improper. She was not the defendant. Moreover, the comment was invited by the departure of the defense from its stipulation that the cash gift made to petitioner by his wife in 1955 had been $50,000 (R. 33b–34b). The defense sought to make it appear that the gift had been at least $50,000 and perhaps $125,000 (R. 45b–47b, 52b–53b). The prosecutor pointed out, quite properly, that if the wife had in fact given more than the stipulated $50,000 amount the proper way to show it would have been to put her on the witness stand (R. 451a–454a). This was not error. *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).

3. Also without merit is petitioner's final contention (Pet. 6–7, 10–11) that the prosecutor practically

accused him of suborning perjury in connection with the testimony about the cash hoard and asserted his personal belief in the falsity of that testimony. Doubtless a certain amount of acrimony did creep into this trial (see *e.g.*, the summation of defense counsel, attacking the good faith of the government, particularly of the Treasury agent who investigated the case (R. 194b–195b, 198b, 207b, 212b, 220b–224b, 229b)). At one point in the trial petitioner's counsel had to be reprimanded by the judge, outside the jury's presence, for virtually accusing the prosecutor of lying (R. 493a–494a). It is in this setting that the prosecutor's remarks must be considered. Viewed in context they did not, as was the case in *Berger* v. *United States*, 295 U.S. 78, 84–88, suggest that the prosecutor was in possession of special knowledge unknown to the jury and not introduced into evidence. A reading of the prosecutor's summation (R. 433a–491a) will disclose that he based his expressions of belief upon facts in evidence. He repeatedly advised the jury that he had no personal knowledge and that the jury could consider only the evidence adduced in court (R. 434a–435a, 444a, 448a). This case is therefore like *Lawn* v. *United States*, 355 U.S. 339, where, in response to a somewhat similar contention, this Court said (355 U.S. at 359–360, n. 15):

> The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper. Cf.

Henderson v. *United States,* 218 F. 2d 14, 19; *United States* v. *Holt,* 108 F. 2d 365, 370; *Tuckerman* v. *United States,* 291 F. 958, 969.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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